HOUSE COMMITTEE ON THE DISTRICT OF COLUMBIA
SIXTY-FIRST CONGRESS, SECOND SESSION

ACT OF RETROCESSION

REPORT OF COMMISSIONERS OF THE DISTRICT OF COLUMBIA TRANSMITTING DRAFT OF H. J. RES. 231, AUTHORIZING THE APPOINTMENT OF A COMMISSION TO CONSIDER THE RESTORATION TO THE DISTRICT OF COLUMBIA OF A PORTION OF ALEXANDRIA COUNTY, VIRGINIA

LETTER OF MR. AMOS B. CASSELMAN
ON THE SAME SUBJECT

JUNE 14, 1910

Printed for use of the Committee

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ACT OF RETROCESSION.

OFFICE COMMISSIONERS OF THE
DISTRICT OF COLUMBIA,
Washington, June 14, 1910.

Hon. S. W. SMITH,
Chairman Committee on District of Columbia,
House of Representatives.

SIR: The Commissioners of the District of Columbia, in accordance with your request of April 30, 1910, have the honor to report as follows upon a proposed resolution to direct the Attorney-General of the United States to prosecute a suit to determine the validity of the act of retrocession

In considering this subject the commissioners have separated it into two parts. The first, relating to the desirability of extending the limits of the District of Columbia as now admitted across to the right bank of the Potomac River, together with the question as to how much and what land, if any, on the right bank should, in the public interest, be administered as a part of the District of Columbia, and the second, as to what method should be pursued to acquire, for the District of Columbia, any areas that may be desired.

With reference to the first of these two questions, it is evident that the most extensive acquisition which could be considered at this time would embrace the whole of Alexandria County. The commissioners do not believe that it is desirable from the standpoint either of Virginia or of the United States that all of this territory should revert to the federal district. The State of Virginia and its citizens would object to giving up considerable taxable areas over which Virginia now exercises sovereignty. The people living in and owning land in the area now indisputably embraced within the District of Columbia would, for many years, be contributing by taxation to the development of another section, because, for many years, expenditures for improvements in the added section would be disproportionately large.

The contribution of the United States to the support of the district would be increased out of any proportion to federal benefits secured.

There appears to be every reason for limiting the area within the District of Columbia to the least amount that will enable the District satisfactorily to fulfill its function as the locus of the national capital.

While it does not seem desirable to acquire all of the territory which was retroceded, yet there remains the very important consideration that those parts of Alexandria County which lie near to the Potomac and in plain sight of the capital, especially that part embracing the Palisades of the Potomac below Chain Bridge, might easily become an eyesore and mar the beauty of the city which confronts them. Already quarries are disfiguring the green slopes and ravines of the Virginia shore.

Two important considerations which must have influenced the authorities in determining the original boundaries of the District of

Columbia were the one military and the other æsthetic. The military consideration has lost all practical importance. The æsthetic consideration yearly gains in importance. The growth of a large city here, perhaps an unexpectedly large city, and the expenditure of so much money in constructing buildings, parks, and the like, of a monumental character, render it essential to the performance of its function that certain limited areas should revert to the federal district.

What would so essentially benefit the city of Washington would benefit the portions of Virginia lying near Washington.

Considerable portions of the land lying across the Potomac, and especially the palisades, would be parked. In parting with sovereignty over so small an area, the State of Virginia could at the same time benefit herself and benefit the nation.

On the other hand, Virginia might be expected to contest strenuously any suit to dispossess her of the whole of Alexandria County. Hard feeling might be engendered. The issue of the suit would be long delayed and uncertain, and if the issue were favorable to the contention of the United States, more territory would pass into the District of Columbia than the District really needs or could administer to advantage.

The attention of the commissioners has been invited to the fact that under an existing Virginia law the United States might purchase land in Virginia for any purpose of the Government and exercise exclusive jurisdiction over it. It would thus be possible for the United States to acquire for park purposes the palisades along the right bank of the Potomac. It is believed, however, that Congress would be slow to exercise this privilege unless the jurisdiction had been previously extended over the immediate environs of such a park and unless the land, being a part of the District of Columbia, could be purchased out of the combined revenues of the latter.

For the reasons given above, the commissioners recommend that the proposed joint resolution under consideration be not passed, but that in lieu thereof there be presented to Congress, with request for its enactment, a draft of another joint resolution similar to that inclosed herewith, with a view to securing the annexation to the Federal District of that limited portion of Alexandria County hereinabove described as especially needed. The joint resolution recommended by the commissioners for enactment is self-explanatory.

A copy of the map referred to in the draft as on file in the office of the engineer commissioner is inclosed herewith.[a] Upon it is indicated the area which, in the opinion of the commissioners, should be added to the District of Columbia. A small contour map, published by the Geological Survey, is also inclosed.[a]

The area of land that was retroceded to Virginia in 1846 embraced 19,600 acres. The amount of land that the commissioners recommend be added to the District of Columbia is 7,300 acres; but over 1,035 acres of this, embracing the Arlington reservation (including Fort Myer and the experimental farm of the Agricultural Department), the United States already exercises sovereignty.

Respectfully,

BOARD OF COMMISSIONERS DISTRICT OF COLUMBIA,
By CUNO H. RUDOLPH, *President.*

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[a] Not printed.

(The following is the joint resolution recommended by the commissioners:)

JOINT RESOLUTION Authorizing the appointment of a commission to consider the restoration to the District of Columbia of a portion of Alexandria County, Virginia.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the President of the United States be, and he is hereby, authorized to appoint a commission, which shall consist of six members and who shall serve without compensation, three of whom shall be citizens of the State of Virginia, and this commission shall consider and report what legislation is requisite on the part of the Congress of the United States and what legislation is requisite on the part of the legislature of the State of Virginia in order to secure the restoration to the District of Columbia of so much of Alexandria County, Virginia, as may be essential to the proper development and maintenance of the capital of the United States, consisting of an area of thirty square miles, more or less, bordering upon the Potomac River, and embracing for the most part those portions of Alexandria County which are nearest to and most plainly visible from points in the District of Columbia on the left bank of the Potomac River, all as indicated upon a map filed in the office of the engineer commissioner of the District of Columbia: *Provided,* That the governor of the State of Virginia, if he shall elect so to do, shall nominate for appointment by the President the three members of the said commission who are citizens of the State of Virginia: *And provided further,* That the members of the commission shall each be paid their actual expenses in going to and returning from Washington, District of Columbia, to attend the meetings of said commission and while attending same.

SEC. 2. That to meet the expenses made necessary by this joint resolution there is hereby appropriated the sum of one thousand dollars, one half payable out of any money in the Treasury not otherwise appropriated, and the other half out of the revenues of the District of Columbia.

LETTER OF MR. AMOS B. CASSELMAN.

WASHINGTON, D. C., *June 14, 1910.*

Hon. SAMUEL W. SMITH,
Chairman Committee on the District of Columbia,
House of Representatives, Washington, D. C.

DEAR SIR: Referring to the several measures that have been proposed for the consideration of your committee, for regaining Alexandria County to the District of Columbia, two distinct methods have been suggested, one or the other of which in some form must be adopted to attain that end. One is by action at law in the Supreme Court to declare the act of retrocession of 1846 unconstitutional and set it aside. The other is by negotiation and agreement with the State of Virginia to obtain her consent to cede again to the United States a needed part of said county, not including Alexandria City, which by reason of its location in the extreme corner of the county can readily be detached and left to Virginia.

Each of these methods has intelligent advocates. The Board of Trade of Washington has adopted a resolution advocating legal proceedings to declare the act of retrocession unconstitutional. The chamber of commerce has adopted a resolution favoring negotiation with Virginia to cede back a portion of the county. The President, who has repeatedly manifested his interest in the subject, has clearly indicated that while not committed to any particular method of regaining the county, he would favor either or any practicable measure designed to accomplish that purpose.

My object in writing this letter is to urge upon your attention some of the many reasons in favor of negotiations with Virginia, in preference to the proposed action in the Supreme Court. Not only are there strong reasons in favor of this more amicable method of procedure,

but there are equally strong objections to the other method proposed, and I may first point out some of these objections.

The recent argument of Mr. Hannis Taylor, in support of his contention that the act of retrocession is unconstitutional and should be set aside, derives interest and importance from Mr. Taylor's reputation as a lawyer and writer, and from the further fact that the Senate of the United States, in recognition of his high rank as an author, has caused his argument to be printed as a public document.

Undoubtedly there are able lawyers who doubt the constitutionality of the act of retrocession, and who earnestly hope to see Alexandria County restored to the District of Columbia, who nevertheless do not concur in Mr. Taylor's views of the Constitution, nor in his statement of the material facts on which his argument is based. His statement of facts, which is in a large measure vital and essential to his argument, contains the following:

> The contemporaneous evidence puts the fact beyond all question that the final definition of a district 10 miles square as the seat of our Federal Government was in a special sense the personal work of President Washington, whose task involved the acquisition of the title to the tract from three sources—the State of Virginia, the State of Maryland, and the 19 local proprietors who owned that part of the heart of the present city which underlies the Capitol, the White House, and the Treasury. Washington's task was to induce the three parties who held title to cede to the Federal Government, without any direct pecuniary consideration, the entire area under a quadrilateral contract in which that Government was the grantee and beneficiary, and Virginia, Maryland, and the 19 local proprietors the grantors. The real consideration moving to such grantors was the incidental benefits to accrue to them from their joint cession, which in the language of the act of July 16, 1790, "is hereby accepted for the permanent seat of the Government of the United States." That covenant represented the only consideration moving directly from the Federal Government, while the three grantors were bound to each other by the mutual considerations moving from the one to the other under interdependent grants.

Obviously, unless this statement is substantially true, the argument based upon it must fall to the ground. Unfortunately, Mr. Taylor's statement is in conflict with historical fact. It is not true, for instance, that "Washington's task involved the acquisition of the title" from Maryland and Virginia. It was unnecessary, nor was it any part of this "task," to induce those States to cede what they had already ceded unconditionally and in the most voluntary manner. Nor is there any basis of fact for the assertion that there was a "contract" between Maryland and Virginia, or by which those States and local landowners were obligated to each other, or that "the three grantors were bound to each other by the mutual considerations moving from the one to the other under interdependent grants." Those States, in ceding territory to the United States for the seat of government, acted separately and independently of each other, and without mutual understandings with local landowners. The historical facts, briefly stated, are as follows:

The Constitution of the United States had provided for the "cession by particular States and the acceptance by Congress" of a district not exceeding 10 miles square to become the seat of government. Pursuant to this provision of the Constitution, the State of Maryland by an act of its legislature approved December 23, 1788, and entitled "An act to cede to Congress a district 10 miles square," etc., authorized its Representatives in Congress to—

> cede to the Congress of the United States any district in this State not exceeding 10 miles square, which the Congress may fix upon and accept for the seat of Government of the United States.

The purpose of this act, at the time of its passage, was to secure the location of the capital in the State of Maryland, and preferably at Baltimore, which was strongly urged as a suitable location.

In like manner on December 3, 1789, the legislature of Virginia enacted a law providing:

> That a tract of country not exceeding 10 miles square, or any lesser quantity, to be located within the limits of this State, and in any part thereof, as Congress may by law direct, shall be, and the same is, forever ceded and relinquished to the Congress and Government of the United States, * * * pursuant to the tenor and effect of the eighth section of the first article of the Constitution of the Government of the United States.

Under this act the capital could have been located at Richmond or anywhere in the State of Virginia.

Other States—Pennsylvania, New Jersey, and Delaware—made like offers of their territory to become the seat of government, pursuant to the above provision of the Constitution and subject to its acceptance by Congress, each State seeking to secure the location of the capital, wholly or in part, within its own domain. On July 16, 1790, Congress finally decided in favor of a location on the river Potomac, between the mouth of the Eastern Branch and the Connocoheague, which points are about 65 miles apart. Said act provided for the appointment by the President of three commissioners, "who shall, under the direction of the President, survey, and by proper metes and bounds define and limit," the said territory. This was "Washington's task." He was invested with the authority to fix the location of the seat of government between the two points designated on the Potomac. It was not his task to "acquire title" or to "induce" the cession of territory, but only to locate and survey the boundaries of the seat of government out of territory which had already been ceded for that purpose and accepted by Congress. When the two States severally ceded their territory, subject only to its acceptance by Congress, and to no other condition, neither they nor the local landowners could possibly know that the lands of such owners would be included within the area subsequently accepted. Maryland "ceded" her "territory" in 1788; Virginia hers in 1789. The landowners "granted" their lands in 1791. The cession and acceptance of 10 miles square of territory to become the seat of government was one transaction. The laying off of a city within that territory was a later and wholly different transaction. There was no necessary connection between the two transactions. There was no contract and no mutuality of agreement or of interest as between the State of Virginia and the local proprietors in Maryland whose lands happened to be embraced within the accepted territory.

When these facts are considered it must be seen that there is no foundation for the theory that there was a "quadrilateral contract," with mutual covenants and obligations between the State of Virginia and the local proprietors in Maryland, a contract the existence of which was never suspected prior to its supposed discovery by Mr. Taylor one hundred and twenty years after the events referred to. The historical facts stated by Mr. Taylor in his argument do not sustain his theory of a quadrilateral contract.

Passing from questions of fact to questions of law, Mr. Taylor's views of the constitutional provision cited by him are not those commonly entertained by lawyers. He says:

> What I can not understand is the fact that in any debate, however hastily conducted, the deeper and more obvious argument based on the contract clause of the Constitution (Art. I, sec. 10) should have been entirely overlooked. And yet the record shows that such was the fact. It never occurred to anyone in 1846, or since that time, to look to the sources of the title in the quadrilateral contract upon which the ownership of the area, 10 miles square, really depends. What is said herein as to that branch of the subject is my personal contribution to the controversy.

The clause of the Constitution referred to, Article I, section 10, is as follows:

> No State shall pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts.

In its plain terms, this provision of the Constitution is a limitation upon the power of the several States, and not upon the powers of Congress. "No State" shall pass any bill of attainder. "No State" shall pass an ex post facto law. "No State" shall pass a law "impairing the obligation of contracts." It has never heretofore been contended that this clause of the Constitution could be invoked against an act of Congress. It has been invoked in a multitude of cases against legislation by a State; never against an act of Congress. (Black's Constitutional Law, third edition, pp. 720–721.) This may in part explain the fact which seems to have surprised Mr. Taylor, that the "argument based on the contract clause of the Constitution should have been entirely overlooked," and that "it never occurred to anyone in 1846, or since that time, to look to the sources of the title in the quadrilateral contract." The reason undoubtedly why Webster and Calhoun, who were in the Senate in 1846, and Senator Hoar and other constitutional lawyers since their day, who have considered this subject, "overlooked" the contract clause of the Constitution and the "quadrilateral contract" is that there was no quadrilateral contract, and that the constitutional provision cited has no bearing upon the case.

Aside, therefore, from other objections to the proposed action in the Supreme Court, it must be deemed a very serious objection that, in the sixty years that have elapsed since the act of retrocession, no one has up to this time demonstrated, by any convincing argument, wherein the Constitution is violated by said act.

One satisfaction is gained from Mr. Taylor's paper. It makes plainer the inexpediency of attempting to recover Alexandria County by the proposed action in the Supreme Court, and that the better and wiser method is that of negotiation and agreement with the State of Virginia. The constitutional question can not be settled by dogmatic assertion; and those who believe that Congress exceeded its powers in the act of retrocession do not insist that the question must necessarily now be settled in court.

On the contrary, there are a world of reasons for settling it otherwise. Justice to Virginia demands that her consent should be sought before she is sued in court. The act of retrocession was not the act of Virginia. It was the act of the United States. It was a mistake. But why should Virginia be sued to correct a mistake made by the United States, at least until after other methods of remedy have been tried? No Attorney-General has ever advised

a suit against Virginia, or that the act of retrocession is unconstitutional. We have unofficial opinions for and against its validity. But it is not upon unofficial opinions that the United States is warranted in suing a State.

The purpose of regaining Alexandria County to the District of Columbia is not merely to assert a legal right. It is higher and broader than that, else it ought not to succeed; and one of the reasons for settling the question out of court, and by agreement, is that this will permit the parties to determine what portion of the county, less than the whole, ought to be restored to the District.

No one will seriously pretend that Alexandria city, with its 20,000 Virginians, situated in the extreme corner of the county, 6 miles from Washington, is needed as an addition to the seat of government. Just what portion of the county, lying in near proximity to Washington City, should be restored to the District of Columbia—just where the line should be drawn—is a question for negotiation. Two different lines have been suggested. A third line embracing a still less area of territory than either of these might be agreed upon. The United States should not desire Virginia to surrender any part of its territory that is not clearly needful as an addition to the present seat of government. The restoration of this territory to the District of Columbia will be a loss to Virginia of revenue from a section that is growing in wealth and population with great rapidity. There is no need to disguise this fact. Yet the United States will not gain, in the matter of revenue, which will fall short of the expenditures necessary for public improvements for many years to come. It is for no selfish reasons that the United States should seek to regain the county. It is the county that will be most benefited by the change. But the United States, in recognition of Virginia's loss, would perhaps be willing to reimburse the State with no ungenerous hand. In 1846 it was justly urged that the county was neglected and that Alexandria failed to share in the benefits extended to the Maryland portion of the District in the matter of public buildings and other improvements. Conditions have changed now, so that the county would be benefited by better schools, highways, parks, police protection, sanitary control by the board of health, and by liberal expenditures for all necessary public improvements.

Objection has been made that the proposed effort to negotiate on this subject with Virginia would be hopeless. This can not be conceded, and can hardly be true. Virginia could hardly refuse to negotiate; and negotiation means agreement. It means that when commissioners representing the United States and others representing Virginia meet to confer on a subject of such important public interest, they will hardly fail to agree in determining what the public interests require. They will agree on some settlement of the question, on some line restoring some portion of Alexandria County to the District, on terms that will be just alike to Virginia and to the larger interests of the United States in her capital. It is true that no one is warranted in saying just what the State may or may not do. But surely no one is warranted in assuming that the State will simply refuse to entertain a proposal to negotiate, or that she will not meet the United States half way on any reasonable and just proposition looking to the settlement of this question.

The movement, which has recurred from time to time, to regain Alexandria County to the District of Columbia, derives whatever of

real force and vitality it has from the intelligent conviction, constantly growing, that the capital will shortly and imperatively require this addition to its territory. It is a movement conceived in no spirit of indifference to the interests of Virginia. It is not a lawyer's controversy over a clause of the Constitution, or over a supposed dormant legal title. Its purpose is higher and broader than that. In so far as it has potency and prospect of success, it springs from unselfish pride in the nation's capital, and from a desire to aid in making it what it is destined ultimately to become, the most imposing and beautiful capital, in the city and its environs, that the human race has seen or conceived. It is a movement which appeals to those who can most appreciate it; and it is significant of this fact that it owes its greatest impulse to its support and advocacy by the President of the United States.

The method of negotiation with Virginia that has been proposed is through the appointment by the President and the governor of Virginia of a joint commission, similar to the action taken by the States of New York and New Jersey in the appointment of a joint commission, and the creation of the Inter-State Palisades Park, in those two States, opposite New York City. That enterprise could not have succeeded but for joint action of the two States. It was aided also by generous private donations from wealthy and public-spirited citizens of the two States—J. P. Morgan, Rockefeller, Mrs. Harriman, Mrs. Russell Sage, and others—in lands and money, aggregating in value several million dollars, and extending the park on the Hudson River almost half way from New York to Albany. It seems not unreasonable to assert that there is in this Hudson River Inter-State Palisades Park a lesson of encouragement to those who would extend the boundaries of the National Capital to include the opposite bank of the Potomac, with its palisades, and an area which, though small, is adapted to make a beautiful river-side park.

Recurring again, finally, to the argument in favor of negotiation with Virginia, as the proper means of regaining Alexandria County, it is worth while to note that in so far as there are any official opinions bearing on this subject they are in support of this argument. Those which have a bearing on the subject, more or less direct, are: (1) The decision of the Supreme Court in Phillips *v.* Payne (92 U. S., 130); (2) the opinion of the Attorney-General (Harmon) in 1896, suggesting in answer to the question, "What legislation is necessary" to regain the county, that the answer "is indicated in the Constitution * * * it is the cession of the territory by the State and an acceptance thereof by Congress;" (3) the report of the Judiciary Committee of the Senate in 1902, through its able chairman, Senator Hoar:

> If it be desirable that Alexandria become a part of the District of Columbia again, the only way to accomplish it will be to open negotiations with Virginia and get her consent.

Since writing the foregoing I have read the report, to your committee, of the Commissioners of the District of Columbia on this subject, just published, which in the main accords with the views above expressed, and in my opinion points the way for action by Congress.

With high regard, I am, very respectfully,

AMOS B. CASSELMAN.

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